IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 190 of 1988

Annappa Kallappa Firangan deceased by
heirs
1. Smt.Chandrabai Annappa Firangan
since deceased by her heirs and L.Rs
2. Adinath annappa Firangan
3. Shantinath Annappa Firangan
4. Neminath annappa Firangan
5.Jayakumar Annappa Firangan
6. Babasaheb Annappa Firangan .. Appellants
(Orig.Plaintiffs)

V/s

1. Shripati Ramchandra Firangan
since deceased by his L.Rs
1A Smt.Laxmibai Shripati Firangan
2. Bhupal Ramchandra Firangan
since deceased by his L.Rs
a) Smt.Shantibai Bhupal firangan
b) Kum.Rajamati Bhupal Firangan
c) Sunil Bhupal Firangan
d) Sunita Bhupal Firangan
3. Dhanpal Ramchandra Firangan
4. Jayapal Ramchandra Firangan

5. Sou.Shrimati Appasaheb Patil

6. Sou.Indubai Bapusaheb Patil .. Respondents

(Orig.defendants)

Shri S.S.Pandit for Appellants

Rupesh Nalawade for Respondents

CORAM:S.R.SATHE,J.

DATED:25th Jan. 2006

ORAL JUDGMENT :-

1. The Appellants-original plaintiffs in Regular Civil Suit No.16 of 1975 have preferred this second appeal against the judgment and order passed by the 3rd Additional District Judge, Kolhapur in Regular Civil appeal No.253 of 1983, whereby the order passed by the trial Judge dismissing the plaintiffs' suit for possession was confirmed and first appeal was dismissed. For the sake of convenience hereafter the parties shall be referred to as the plaintiffs and defendants.

2. Brief facts giving rise to this appeal are as under:

. Original plaintiff no.1 Annappa K. Firangan and father of original defendant no.2 to 6 viz. Ramchandra were cousin brothers. Plaintiff nos.2 to 6 and original defendant no.7 are sons of original plaintiff no.1 Annappa. The land bearing Survey NO.298 situated at village Hupri, Taluka

Hatkanangle, District Kolhapur was initially owned by Jahagirdar of Ichalkaranji. The said land was in possession of Shridhar Nawale, Annappa Firangan and Ramchandra Firangan. Shridhar Nawale purchased the said property from Jehangir of Ichalkaraji and thereafter half portion on the southern side of the said land was purchased by original plaintiff no.1 and deceased Ramchandra by registered sale deed dated 10-6-1959. The said land was admeasuring 9 Acres 35 gunthas. At that time the said land was in the joint vahiwat of Annappa and deceased Ramchandra. According to plaintiffs half of the consideration i.e. Rs.5,000/- were paid by deceased Ramchandra and half i.e. Rs.5,000/- were paid by Annappa. On the basis of the said sale deed the names of Annappa and deceased Ramchandra were also entered in record of rights in Holders column to the extent of half share in the year 1973. The defendants started obstructing plaintiffs' possession of the suit land which is admeasuring 2 Acres 19 1/2 gunthas. At that time plaintiffs came to know that one mutation entry no.4547 was made in the year 1985 or thereabout whereby it was shown that Ramchandra was in possession of 3/4th share of the land purchased under sale deed dated 10-6-1959 while Annappa i.e. original plaintiff no.1 was in possession of 1/4th share of the land purchased under the sale deed. Plaintiff therefore came to know that when he had been to the office of Talathi on 19-2-1965 for getting the names of his sons entered in the record of rights, the defendant no.1 had also come there he and Talathi in collusion with each other and taking

advantage of the fact that the plaintiff no.1 was simpleton person obtained the signatures of plaintiffs nos.1 and 2, representing that signatures were required for entering the names of sons of plaintiff no.1 entered in the record of rights. The plaintiff therefore asked the defendants to hand over the possession of their land of which they had taken forceful possession. As defendants refused do so plaintiff filed suit for possession of the land admeasuring 2 Acres 19 1/2 gunthas, described in detail in para 1 of the plaint.

3. The defendant nos.1, 3 and 4 filed written statement at Exh.27 and opposed the suit claim. They admitted the relationship between the parties and the fact that initially the land was owned by Jahagirdar of Ichalkaranji and it was thereafter purchased by Shridhar Nawale. The defendants further contended that their father deceased Ramchandra wanted to purchase the said land which was in the joint possession of plaintiff no.1 and deceased Ramchandra. The price of the land was fixed at Rs.10,000/-. However, Shridhar Nawale was not ready to execute the sale deed only in the name of defendants' father Ramchandra as land in question was in possession of plaintiff no.1 and deceased Annappa. The original plaintiff no.1 had no sufficient funds to purchase the land. It is the contention of the defendants that their father deceased Ramchandra therefore decided to purchase the land in his name and in the name of plaintiff no.1 and as a result of the same though plaintiff

no.1 had not paid any amount it was mentioned in the sale deed that consideration has been paid by each of them equally. Defendants also contended that as the name of plaintiff no.1 was also to be shown in the sale deed, it was agreed between plaintiff no.1 and deceased Ramchandra that 3/4th share of the said land would remain in possession of Ramchandra. As per said agreement the plaintiff no.1 also submitted an application accordingly to Talathi. On the basis of the said application mutation entry no.4547 was made and plaintiff no.1 started cultivating 1/4th share while deceased Ramchandra started cultivating land of 3/4th share. The defendant no.1 further contended that half portion of the land under sale deed was never in actual possession of plaintiff no.1. They also denied plaintiff's allegation that mutation entry mentioned above was got executed by playing fraud upon plaintiff no.1 and that they have taken forcible possession of the land which was in possession of plaintiff no.1. Thus on all these grounds the defendants prayed for dismissal of the suit.

4. On these pleadings the learned trial Judge framed issues at Exh.43. In order to prove their case plaintiffs examined Adinath Annappa Firangan, son of original plaintiff no.1 and one other witness by name Bhagwant Dadu Patil. As against this, defendant no.1 examined himself and 3 others witnesses, viz. Dhanpal Nawale Exh.107, Shamu Upadhye Exh.108 and Appasaheb Naik Exh.109. After considering the oral as well as documentary evidence adduced by both the

parties the learned trial Judge came to the conclusion that defendants have proved that entire consideration for the sale deed dated 10-6-1959 was paid by Ramchandra and name of the plaintiff no.1 was included nominally. He also held that the plaintiffs have failed to prove that deceased Ramchandra had played fraud upon original plaintiff no.1 and got his name entered in the record of rights to the extent of 3/4th share of the said land. The learned trial Judge also hold that the plaintiffs failed to prove that original plaintiff no.1 was put in possession of the land admeasuring 4 Acres and 37 gunthas. The learned trial Judge also denied the plaintiffs' allegations that defendant took possession of the land forcibly and unlawfully. Naturally he dismissed the plaintiffs' suit.

5. Being aggrieved by the said judgment and order the original plaintiffs filed Regular Civil Appeal No.253 of 1983. After hearing both the learned advocates the first appellate Court came to the conclusion that the trial Court has rightly dismissed the plaintiffs' suit. He therefore dismissed the said appeal.

6. The above mentioned order passed by the 3rd Additional District Judge, Kolhapur is challenged in the present second appeal. From the perusal of the record it appears that while admitting the appeal the Court passed the following order :

"Admit on grounds (a) and (b)."

. The said grounds are under :-

(a) Whether the lower courts were justified in law in making out a new case for the defendants which is neither pleaded in the written statement nor a specific issue was framed in the trial Court to enable the parties to lead evidence to that effect?

(b) Whether the lower Courts were justified in law in holding that the registered sale deed in favour of Ramchandra and annappa was a Benami transaction, especially when the defendants case is that Annappa is supposed to have retained one fourth of the suit land under the sale deed, instead of one half as recited in the sale deed?

7. In this appeal before me, Shri Pandit, learned Advocate for the plaintiffs has urged only two points. Firstly,he submitted that though defendants had not at all made out a case of Benami transaction even then the courts below entered into that point when the defendants themselves had stated that Annappa- plaintiff no.1 was in possession of 1/4th share of the said land under sale deed in question. Secondly,he canvased before me that having regard to the provisions of Sections 91 and 92 of Indian Evidence Act, 1872 the trial Court should not have allowed to lead oral

evidence on the point that consideration was not paid by the original plaintiff no.1 and the transaction was of Benami nature. He therefore submitted that findings recorded by the lower Courts below are not legal and correct and as such the appeal be allowed and plaintiffs suit be decreed. As against this, Mr.Nalwade,learned Advocate for the defendants supported the judgment and order passed by the 3rd Additional District Judge, Kolhapur.

8. The relationship between the parties is not in dispute. Admittedly, the land in question was initially owned by Jahagirdar of Ichalkaranji and the said land was purchased by Shridhar Nawale in the year 1957. It is also not in dispute that the land admeasuring 9 Acres 25 gunthas of the said Survey No.298 was being cultivated by original defendant no.1 and deceased Ramchandra. It is also admitted that on 10-6-1959 Shridhar Nawale sold the said land by virtue of registered sale deed and the sale sale deed is in the name of plaintiff no.1 deceased Ramchandra. Admittedly, the consideration for the same was Rs.10,000/-. There is recital in the said sale deed wherein it is said " ----------" means consideration is paid by both of them equally. It is also admitted by that on the basis of the said sale deed the names of plaintiff no.1 and deceased Ramchandra were entered in the record of rights and each one of them was shown to be the owner of the land admeasuring 4 Acres 27 1/2 gunthas.

9. It is the case of plaintiffs that as per said sale deed they were in fact in possession of the land admeasuring 4 Acres 37 1/2 gunthas right from the sale deed. However, mutation entry no.4547 was got executed by deceased Ramchandra by playing fraud on the original plaintiff and thereafter taking advantage of the same they started obstructing plaintiffs' vahiwat of the said land and in fact took forcible possession from them. As against this, the defendants have specifically stated that though the sale deed was standing in the joint names, entire consideration was paid by deceased Ramchandra. So, from that angle it is pleaded that transaction of the said sale deed was of Benami nature. It is true that the defendants have also clearly admitted that at the time of sale deed deceased Ramchandra had agreed that plaintiff no.1 would remain in possession of 1/4tgh share of the land purchased. So, it is very clear that though in the written statement the defendants had not specifically used the word Benami, they had made it amply clear that according to them transaction was of Benami nature. Naturally, both the courts below have considered the said point. By no stretch of imagination it can be said that there was no pleading regarding Benami transaction and issue regarding Benami was invented by the courts below. In my opinion, there is no substance in the argument advanced by the learned Advocate for the plaintiffs in this behalf.

10. The entire endeavour of the defendants was to show that the transaction in question was of Benami nature and though

it was mentioned in the sale deed that consideration was paid equally by plaintiff no.1 and deceased Ramchandra, in fact entire consideration was given by deceased Ramchandra. Naturally, for that purpose they have adduced oral and documentary evidence. Shri Pandit, learned Advocate for the plaintiffs strenuously argued before me that there is specific averment in the sale deed as to how the consideration was paid and as such the defendants were in fact not entitled to adduce any oral evidence contrary to the sale deed, recital in view of the provisions of Sections 91 and 92 of the Indian Evidence Act. It is therefore necessary to see what the said sections 91 and 92 say :-

> 91. Evidence of terms of contracts, grants and other dispositions of property adduced to form of documents - Where the terms of a contract, or of a grant, or of any other disposition of property,have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other deposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
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> 92. Exclusion of evidence of oral agreement - when the terms of any such contract, grant or other deposition

> of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting varying, adding to, or subtracting from, its terms.

11. The learned Advocate for the plaintiffs argued before me that averments with regard to the consideration in the sale deed was has to be regarded as ‘term of the contract’ and as such the defendants are not entitled to adduce any evidence contrary to the said term. However, I for one do not agree with this submission. The recital that consideration is paid by both of them equally cannot be said to be term of contract. Both the parties are not disputing the consideration amount. It is not even the case of the defendants that consideration was not Rs.10,000/- but something else. All that defendants are saying is that the said recital is not correct. It is well settled that parties are definitely entitled to adduce evidence to show that particular fact mentioned in the document is not correct, so long as the said fact cannot be said to be a term of contract. It is well settled that the mode of payment of consideration cannot be treated or regarded as ‘term of contract.’ So, taking into consideration this aspect it is very clear that evidence adduced by parties on

the point as to who paid the entire consideration and how it was paid was certainly not barred by provisions of Sections 91 and 92 of Indian Evidence Act. We cannot ignore the fact that in the case of Benami transaction if it is said that party is not entitled to adduce any evidence to show as to how a particular fact mentioned in the sale deed or the document is not correct and parties are restricted to accept the document as it is, then no one would be in a position to prove as to how that transaction is Benami or in other words to prove as to who is the real owner and who is the ostensible owner. So, it is very clear that both the courts below have rightly considered the evidence on record holding that said oral evidence is not hit by the provisions of Sections 91 and 92 of the Indian Evidence Act.

12. This takes me to the question as to whether the defendants have proved that consideration was paid entirely by deceased Ramchandra and name of the plaintiff no.1 was included in the sale deed because as a result of the same it was possible for the defendant no.1 to purchase the land and hence defendant no.1 also agreed that 1/4th of the land purchased under sale deed shall remain in possession of the plaintiff no.1. From perusal of the judgments of the Courts below it is very clear that they have rightly taken into consideration various factors such as from which party consideration of sale deed had flown, possession of the property, character of the said possession, custody and production of the original title deed, motive for entering

into benami transaction, relationship between the parties, financial position and status of the parties and previous and subsequent conduct of the parties, while coming to the conclusion as to whether the transaction in question was benami or not. In the instant case, admittedly, the land in question was in the joint possession of the original plaintiff no.1 and deceased Ramchandra. It has come on record that financial position of the plaintiff no.1 was not good while that of deceased Ramchandra was good, all negotiations with regard to sale deed had taken place with deceased Ramchandra. Even in the said sale deed it was mentioned that amount of Rs.9,200/- was paid to the deceased vendor by Ramchandra much prior to the sale deed. So, the case of the plaintiff no.1 that at the time of sale deed he paid sum of Rs. 5,000/- obviously appears to be incorrect. The persons who were present at the time of sale deed also supported the case of defendants. Besides this, admittedly, the document of title was in possession of the defendants and not in plaintiff's possession. What is more to be noted is that soon after the sale deed the original plaintiff no.1 submitted an application to Talathi wherein he accepted that 3/4th share of the land shall remain in possession of deceased Ramchandra and only 1/4th share would be in his possession. This itself shows that averments in the sale deed that consideration was paid by both of them equally is not true and correct and on the contrary the case of the defendants that it is only because the plaintiff no.1 was shown as purchaser in the said deed the deceased Ramchandra

was able to get the sale deed executed from Shridhar Nawale, the deceased Ramchandra agreed that 1/4th land would be in possession of the plaintiff no.1 is correct. Considering all the facts and circumstances of the case and proponderence of probabilities the case of the defendant no.1 seems to be true and correct. The courts below have therefore rightly held that transaction in question appears to of Benami.

13. It is an admitted fact that even after the time Consolidation scheme was made applicable the plaintiff was shown in possession of the land admeasuring 2 Acres 19 1/2 gunthas while defendants were shown in possession of the land admeasuring 7 Acres 17 gunthas. It is difficult to belive that plaintiff no.1 had no knowledge about the said entry. He has also utterly failed to adduce any evidence worth the name to show that deceased Ramchandra played fraud upon him and obtained his signature on the application representing that his signature was being obtained in connection with entering the name of his sons in the record of rights. Some of the defendants witnesses were present at the time of sale deed in question. Besides that they were present at the time of partition. What is important to be noted is that those witnesses have also supported the defendants version. Thus, the concurrent finding of fact recorded by both the courts below is unassailable and therefore there is no necessity for this Court to disturb the said finding in this second appeal.

14. In view of the above, it is very clear that both the courts below have rightly held that entire consideration was paid by the deceased Ramchandra and plaintiff no.1 was put in possession of the land only to the extent of 1/4th share out of land purchased in the sale deed 10-6-1959 and rightly negatived the plaintiff’s claim. In this view of the matter there is no substance in this appeal. Appeal is dismissed with costs.

(S.R.SATHE,J.)